sel. The latter appeared to have conceded "that 3% is not in accordance with the customary payment." Had it not been for the counsel's request, we are quite certain that the learned Judge would have awarded 3%, having decided on the evidence in favour of the respondent. The respondent's counsel is of course entitled to ask for a lesser amount than that to which his client is entitled having regard to the relationship between solicitor and client and the privileged communication between them. Based on the principles discussed earlier, we hold that judicial notice cannot be applied in this case. In any event, we do not wish to disturb the Judge's finding for obvious reason. The respondent was satisfied with the award of $460,000 at 2% as commission, which we confirm. The appeal is therefore dismissed with costs. The deposit to be paid to the respondent on account of taxed costs.

With regard to the cross-appeal by the respondent, it is clear that the learned Judge has inadvertently omitted to award interest as prayed at 8% per annum from March 19, 1981, *i.e.*, from the time the respondent became entitled to the said sum till the date of judgment. That was also conceded by the appellant's counsel. We therefore allowed the cross-appeal with costs.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Skrine & Co.*

RAMLI BIN KECHIK v. PUBLIC PROSECUTOR

[S.C. (Abdul Hamid C.J. (Malaya), Mohamed Azmi & Syed Agil Barakbah S.C.JJ.) November 18, 1985 & January 10, 1986]

[Penang – Supreme Court Criminal Appeal No. 40 of 1984]

Criminal Law and Procedure – Trafficking in raw opium – Application to send exhibits to the Chemistry Department for further examination and the calling of fresh evidence on said exhibits – Definition of "raw opium" – Chemist's evidence on species origin of exhibits – Dangerous Drugs Act, 1952, ss. 2 & 39B – Evidence Act, 1950, s. 114(e) – Criminal Procedure Code (F.M.S. Cap. 6), s. 425.

Dangerous Drugs – Trafficking in raw opium – Definition of "raw opium" – Fresh evidence of chemist – Dangerous Drugs Act, 1952, ss. 2 & 39B.

Evidence – Fresh evidence on exhibits – Admission of relevant evidence even if illegally obtained.

In this case the appellant was convicted in the High Court for trafficking in 15,603 grammes of raw opium in contravention of section 39B(1) (a) of the Dangerous Drugs Act, 1952 and sentenced to death. He appealed against both conviction and sentence. The only point raised on the appeal was whether the trial judge had erred in law in entertaining the application of the prosecution under section 425 of the Criminal Procedure Code during the course of the prosecution case. During the trial, after three prosecution witnesses had given evidence it dawned upon the prosecution that it was necessary for them to prove that the opium found in the possession of the appellant had been extracted from the plant species Papaver somiferum L. in order to constitute "raw opium" within the definition of section 2 of the Dangerous Drugs Act, 1952. The trial judge allowed the said exhibits to be sent to the Chemistry Department to determine its species origin and on resumption of hearing he allowed such evidence to be adduced by the prosecution.

Held, dismissing the appeal: (1) by its very nature the discretion to be exercised under section 425 Criminal Procedure Code depends on the facts of each case – the main consideration being the essentiality of the additional evidence to a just decision of the case. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the court would be justified in exercising its discretion in calling for additional evidence under this section;

(2) when the court makes an order for court exhibits to be handed over to the police or any other officer for a certain purpose, it may be presumed under section 114(e) of the Evidence Act that such judicial and official acts have been regularly performed. The unbroken chain of evidence may therefore be presumed unless the contrary is shown;

(3) in the context of section 425 Criminal Procedure Code and independently of the court's inherent power over court exhibits, a trial court has power to order examination of any such exhibits by expert witnesses at any stage of the trial or proceeding, if such examination is necessary for the procurement of the essential evidence to enable the court to get at the truth and to arrive at a just decision. In addition, the court also has inherent power to examine court exhibits in or away from the court room either by itself or by witnesses for purpose of identification. It is immaterial that such examination may amount to an investigation provided it is done for the limited purpose of determining the truth of a material and essential matter in issue. Whether such inherent power over court exhibits has been exercised judicially must depend on the facts of each particular case;

(4) in this appeal, the fresh evidence of a chemist as to whether the opium had come from the species Papaver somniferum L. [PSL] or from Papaver setigerum D.C. [PSDC] was undeniably essential for a fair trial and a just decision of the case, and the learned judge had acted judicially in allowing the application under section 425 during the course of the prosecution case. The evidence of the second chemist [Mr. Tham] was not in fact obtained illegally; nor was it obtained by improper or unfair means. The relevancy of Mr. Tham's evidence not being in dispute, it was accordingly admissible in law and properly admitted by the trial judge;

(5) when exercising its appellate jurisdiction in criminal cases, before the Supreme Court will interfere it must be

shown to its satisfaction that an essential principle of justice has been infringed in such circumstances as to occasion a substantial miscarriage of justice. The court need not interfere if it considers that no substantial miscarriage of justice has occurred although the issue raised in the appeal might be decided in the appellant's favour.

Cases referred to:

(1) *Rengasaswami Naicker's* case [1954] Cr. L.J. 123.
(2) *State* v. *Kishan Dayal* [1952] Cr. L.J. 1128.
(3) *Satyanaranan Singh* v. *State of Hyderabad* A.I.R. 1955 Hyd. 145.
(4) *Ramachandra* v. *Emperor* A.I.R. 1937 Pat. 246.
(5) *Arjundas Khandelwal* v. *Basant Lal* A.I.R. 1953 V.P. 16.
(6) *In re Ramanathan* A.I.R. 1957 Mad. 466.
(7) *R.* v. *Khoo Guan Teik* [1957] M.L.J. 128.
(8) *Lee It Leo* v. *R* [1954] M.L.J. 215.
(9) *Muhammad Nawaz* v. *King Emperor* L.R 68 I.A. 126, 128.
(10) *Subramaniam* v. *Public Prosecutor* [1956] M.L.J. 220, 223.
(11) *Public Prosecutor* v. *Ching Teck Chuan & Anor,* K.L. Crim. Appeal No. 7 of 1957.
(12) *Kuruma* v. *The Queen* [1955] A.C. 197, 203.
(13) *Reg.* v. *Sang* [1980] A.C. 402, 437.
(14) *Fox* v. *Chief Constable of Gwent* [1985] 1 W.L.R. 1126.

SUPREME COURT.

Karpal Singh for the appellant.

Ahmad Zaki (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the Judgment of the Court): The appellant was convicted by Mustapha J. at the High Court Kangar for trafficking in 15,603 grammes of raw opium in contravention of section 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and sentenced to death under section 39B(2) of the same Act. His appeal to the court is against both conviction and sentence, but during argument the only point raised is whether the trial judge had erred in law in entertaining the application under section 425 Criminal Procedure Code (C.P.C.) of the Deputy Public Prosecutor during the course of the prosecution case, to send nine exhibits found in the possession of the appellant and marked as Exhibits P7 to P15 to the Chemistry Department for further examination and the calling of fresh evidence on the said exhibits.

The main issue for determination is the scope of the provision of section 425 C.P.C. which provides:–

"Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

For this purpose, section 540 Indian Criminal Procedure Code 1898 is *in pari materia* with our section 425. From the commentaries on the Code of Criminal Procedure 1898 by *Chitaley & Rao,* Vol. IV (5th Edition) the scope of this section is to enable and in certain circumstances to impose on the court the duty of summoning witnesses who would not otherwise be brought before the court. The section consists of two parts, the first giving a discretionary power to the court under which it may (1) summon any person as a witness or (2) examine any witness in attendance, though not summoned as a witness or (3) re-call or re-examine any person already examined. The second part of the section imposes an obligation on the court to summon and examine or re-call and re-examine any such person if his evidence appears essential to the just decision of the case. The section is intended to enable the court to get at the truth and to come to a proper conclusion in the matter under inquiry or trial. It is not limited to witnesses whom the court examines on its own behalf but also applies to witnesses for the prosecution as well as witnesses for the defence. Hence, the defence as well as the prosecution may be allowed to adduce additional evidence under this section. The object of the section is just as much the prevention of escape of a guilty person through some carelessness of the prosecution or the Magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one party. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the court would be justified in exercising its discretion in calling for additional evidence under this section. Where the court is of the opinion that the evidence of certain witnesses is essential to the just decision of the case, it is bound to summon them, and for this purpose the trial can be adjourned. A just decision under this section does not mean a decision in favour of the defence (see *Rengaswami Naicker's* case(1)). Thus, it would not be an improper exercise of the power merely because the evidence taken supports the case of the prosecution and not that of the accused. In our view, by its very nature the discretion to be exercised under section 425 C.P.C. depends on the facts of each case – the main consideration being the essentiality of the additional evidence to a just decision of the case.

In the *State* v. *Kishan Dayal*[2] the respondent was charged for criminal breach of trust and falsification of accounts under sections 409 and 477A Penal Code. In order to prove that certain book entries and figures were in the handwriting of the respondent and not that of one Paras Ram, it was necessary for the prosecution to call a handwriting expert and witnesses acquainted with the handwriting of both the persons. No expert witness was, however, produced and the witnesses who were produced were not acquainted with the handwriting of the respondent. As a result, presumably of the defence putting certain questions to PW.12 it dawned upon the prosecution that it was necessary to summon a handwriting expert and thereupon an application was made under section 540 Indian C.P.C., but the Magistrate rejected it on the ground that it was not pressed. On appeal, it was held that where it was patent to the Magistrate that the examination of a handwriting expert in a case was absolutely necessary, it was his bounden duty, even without any suggestion emanating from the prosecution, to summon such a witness under section 540; and there was no stage in the trial of the case which could be considered by him too late for taking that action. The facts of that case were somewhat similar to the one before us, except that in the present case instead of identifying handwriting of the two persons, the purpose of granting the application, though not recorded, was clearly for the calling of a chemist to identify whether the opium found in the possession of the appellant was from species Papaver Somniferum L. (PSL) or from Papaver Setigerum D.C. (PSDC). In this case the first chemist Mr. Sim Hock Lye (PW.1) gave evidence on April 14, 1984. He had examined and analysed the contents of the nine exhibits and on chemical tests he had found them to contain 15,603 grammes of raw opium. Although Mr. Sim was satisfied that they were "raw opium" within the meaning of the Act, it was apparent from his cross-examination that he did not carry out a special test which was newly discovered in Japan and known as a 'profile test' to determine which plant species the raw opium had come from. As a result of the defence cross-examination of Mr. Sim, it dawned upon the prosecution that it was necessary for them to prove that the opium had been extracted from the species PSL in order to constitute "raw opium" within the definition of section 2 of the Act. On May 27, 1984, after three prosecution witnesses had given evidence, the trial judge, acting under section 425, Criminal Procedure Code, allowed the prosecution application to send the nine exhibits to the Department of Chemistry for further examination. The case was then adjourned to July 22, 1984 and it was during the resumption of hearing that a second chemist – Mr. Tham Kok Peng (PW.5) gave evidence that on the basis of a profile test, the said exhibits had indeed come from PSL and not from PSDC or any other plant from which morphine might be produced, and as such the exhibits were "raw opium" as defined by section 2 of the 1952 Act. Before the Act was amended vide Act A596 of 1984 which came into force on September 7, 1984, "raw opium" was defined by the statute to mean, "the spontaneously coagulated juice obtained from the plant Papaver somniferum, L., which has not undergone the process necessary to convert it to medical opium, whatever its content of morphine." That was the relevant statutory definition of "raw opium" applicable at the trial of the appellant and therefore, to come within the definition, the opium must come from the species PSL and not merely from any plant such as PSDC which was expressly mentioned in the pre-amendment definition of "opium poppy" in section 2 of the Act.

In our opinion, what the learned judge actually did, in this case, was to allow the prosecution to adduce additional evidence by calling the second chemist Mr. Tham (PW.5) pursuant to examination by the said expert witness of the nine exhibits. To come under section 425 the question to be asked is whether the evidence of Mr. Tham was essential to the just decision of the case. First, it is pertinent to note that the exhibits had become court exhibits. If at time of application the exhibits were still in the custody of the prosecution, then for the purpose of sending them to the Chemistry Department there would of course be no need to get a court order. What remained to be done would merely be to apply for an order allowing the prosecution to adduce additional fresh evidence from the Chemistry Department. It is therefore important to appreciate that in effect the order of the learned judge in sending the opium exhibits to the Chemistry Department for determination of its origin is merely consequential to the application for production of fresh evidence. If such fresh evidence is essential to the just decision under section 425, how else could the evidence be obtained save by sending the exhibits to the Chemistry Department for examination? It is true that the way the order was recorded by the learned judge gives more prominence to the sending of the court exhibits to the Chemistry Department rather than the calling of additional evidence, and thus creating the wrong impression that the essentiality of the additional evidence to a just decision is of secondary importance. In reality this

cannot be so. As such we are of the view that in this particular case the order sending the court exhibits to the Chemistry Department is covered by section 425 on the condition that the calling of additional evidence is justified under that section. Secondly, there was the evidence of the first chemist, Mr. Sim, that as far as he was concerned exhibits P7 to P15 were raw opium within the meaning of the Act, notwithstanding that he did not know about and had not carried out a profile test. The expert evidence of Mr. Sim showed that PSDC had no commercial value and it was very unlikely that the relevant exhibits were extracted from that species. In short, without the profile test there was no positive evidence that the exhibits were or were not raw opium within the meaning of the Act. In that situation, we are of the view that the learned judge was justified under his inherent power over court exhibits in ordering the opium for further examination and analysis. He clearly acted in the interest of justice because at that stage the result of the profile test was still unknown and could either be in favour of the appellant or the prosecution. It was, therefore, as much in the interest of the appellant as of the prosecution that the exhibits be sent for further examination to determine once and for all whether the opium found in the possession of the appellant had come from PSL or PSDC. On the facts of the present appeal, we think that the learned judge had exercised his discretion judicially under section 425 by allowing fresh evidence to be adduced by the prosecution. The evidence of the Chemistry Department which could only be obtained by examination of the court exhibits by another chemist to determine their species was absolutely essential to the just decision of the case, and as such the learned judge was justified in allowing the prosecution application, although it would have been better if he had recorded the reason for so doing notwithstanding its potency from the notes of evidence.

Mr. Karpal Singh has cited four cases to advance his argument that what the learned judge did was not a correct exercise of his discretion under section 425. Having perused the authorities in detail we do not think that they are in favour of the appellant except for the requirement of recording the reason for granting the application. The first authority cited – *Satyanaranan Singh* v. *State of Hyderabad*[3] is concerned with the interpretation of section 252(2) Indian Criminal Procedure Code 1898. The ruling that section 540 C.P.C. should not be exercised in the middle of the prosecution case was made in conjunction with section 252(2) under which the power of the court to examine important witnesses should not be exercised until the prosecution evidence is concluded. As such, the case is not relevant to the present appeal. In *Ramachandra's* case,[4] the Magistrate court ordered, at the instance of the prosecuting officer, that two witnesses be recalled and one fresh witness called and certain fresh documents be called for. The witnesses were examined and the documents put in evidence by the court purporting to act under section 540 after the conclusion of the defence. The appeal of the accused was allowed on other grounds, but on further appeal, the case was sent back to the appellate court to consider whether the additional evidence which the Magistrate had admitted under section 540 had been properly admitted or not, and if properly admitted, to determine the case on the merits of the entire evidence. As regards *Arjundas Khandelwal* v. *Basant Lal*[5] on the facts, the court held that the fresh evidence was essential to a just decision and as such it reiterated the purpose of section 540. Finally, *In Re Ramanathan,*[6] it was held that the power under section 540 was a discretionary one, and the discretion had to be exercised judicially for reasons to be recorded by the court. The case involved the power of Indian Court to examine witnesses not mentioned in the charge sheet – a situation which has no equivalent in our courts.

As alluded to earlier, we do not find these authorities to have much bearing in the legal argument canvassed on behalf of the appellant. Even the failure of the learned judge to make his order more lucid or his failure to record his reason for granting the prosecution application cannot be fatal in the circumstances of the case, particularly when the reason is self-evident from the notes of evidence *viz.* to determine the species of the plant from which the opium came, which is absolutely essential to the just determination of the case. In an unsolicited written submission sent to us by Mr. Karpal Singh it is argued that due to a broken chain of evidence, the prosecution had not proved that the exhibits produced in court were the ones examined by Mr. Tham. Though the point was not taken up at the trial, there are authorities which laid down the rule that an unbroken chain of evidence must be established by the prosecution as to the retention and custody of an exhibit from the moment it is first seized to the time it is produced in court (see *R.* v. *Khoo Guan Teik*[7] and *Lee It Leo* v. *R.*[8]). But, different considerations apply to exhibits which have been produced in court as is

the case here. When the court makes an order for such exhibits to be handed to the police or any other officer for a certain purpose, it may be presumed under section 114(e) of the Evidence Act that such judicial and official acts have been regularly performed. The unbroken chain may therefore be presumed until the contrary is shown. In this appeal, there is no evidence to suggest that the exhibits have been tampered with at any stage of the trial; nor is there evidence that the court order to hand over the exhibits to the police with instruction to send them to the Chemistry Department was not properly carried out. On the contrary, Mr. Tham did testify that when he received the exhibits they were sealed with the seal of the High Court and that after examining them they were returned to ASP Yap (PW.3).

In *Muhammad Nawaz* v. *King Emperor*[9] Lord Simon had this to say in laying down the narrow jurisdiction exercised by the Judicial Committee of the Privy Council in criminal cases:

"Broadly speaking, the Judicial Committee will only interfere where there has been an infringement of the essential principle of justice. An obvious example would be a conviction following a trial where it could be seriously contended that there was a refusal to hear the case of the accused, or where the trial took place in his absence, or where he was not allowed to call relevant witnesses."

The above statement was applied by the Judicial Committee in *Subramaniam* v. *Public Prosecutor*[10] when the Board allowed the appeal of the appellant on the ground that the appellant had not been allowed to give relevant and admissible evidence which was a circumstance very similar in its consequences to not being allowed "to call relevant witnesses." In delivering the judgment of the Board, Mr. L.M.D. de Silva added:

"It is not however, in every case that admissible evidence be shut out that their Lordships will interfere, and the question whether this is a case which warrant interference requires further consideration."

We think the same general principle should be applied in this court when exercising its appellate jurisdiction in criminal cases. In addition, the proviso to section 60 of the Courts of Judicature Act 1964 is relevant in determining the powers of the Supreme Court in dealing with criminal appeals. The proviso is in the following terms:—

"Provided that the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred."

Thus, before the court will interfere it must be shown that an essential principle of justice has been infringed in such circumstances as to occasion a substantial miscarriage of justice. The court need not interfere if it considers that no substantial miscarriage of justice has occurred although the issue raised in the appeal might be decided in the appellant's favour.

As alluded to earlier, the relevancy of Mr. Tham's evidence is not in question. What then is the principle of justice that has been infringed? We must discover the answer before we proceed to consider whether such infringement has occasioned a substantial miscarriage of justice. Mr. Karpal Singh has not expressly identified any particular infringement beyond saying that by sending the exhibits for further examination the trial judge was reopening the investigation. But in the circumstances of this case, we are of the view that it is in the interest of justice that the second chemist Mr. Tham be allowed to examine the exhibits. For reasons already stated and to be stated shortly, what the learned judge did was covered by section 425 C.P.C. and by his inherent power to deal with court exhibits. We are of the view that whatever infringement there might be, like the non-recording of the reason for granting the application or the unsatisfactory manner in which the order granting the prosecution application was recorded, it is not one against any principle of justice so as to occasion any substantial miscarriage of justice. As such, this is not a proper and fit case which merits our interference.

In the ultimate analysis, the actual issue in this appeal is whether the evidence of the second chemist (PW.5) is admissible in law and properly admitted by the learned judge. On the resumption of hearing on May 27, 1984, the learned judge had allowed PW.5 to give fresh evidence for the prosecution on the species origin of the nine exhibits, that is to say, whether the opium had come from species PSL or PSDC. As stated earlier, there can be no dispute that his evidence is absolutely essential to the just decision of the case within the meaning of section 425 C.P.C. The only real complaint of the appellant is the manner by which the essential evidence was obtained. In our judgment, since it was within the lawful discretion of the learned judge under section 425 to allow the prosecution to adduce additional evidence from the Chemistry Department, it must necessarily follow as a consequence to that exercise of judicial discretion for the court to make the order of sending the nine exhibits to the said Department for examination. There is no suggestion that a trial

court is helpless to deal with exhibits already produced in court in order to arrive at a just conclusion. In *Public Prosecutor* v. *Ching Teck Chuan & Anor.*,[11] it was held that if justice could be done by undoing the wrapping of an exhibit and recalling a witness to identify it then the court had a duty to do so. We see no distinction in principle between examination of a court exhibit in court and outside the court by expert or identifying witnesses. We are of the opinion that in the context of section 425 C.P.C. and independently of the court's inherent power over court exhibits, the court has power to order examination of any such exhibit by expert witnesses at any stage of the trial or proceeding, if such examination is necessary for the procurement of the essential evidence to enable the court to get at the truth and to arrive at a just decision. In addition, the court also has inherent power to examine court exhibits in or away from the court either by itself or by witnesses for purpose of identification. It is immaterial that such examination may amount to an investigation provided it is done for the limited purpose of determining the truth of a material and essential matter in issue. Whether such inherent power over court exhibits has been exercised judicially must of course depend on the facts of each particular case.

Further, it is a well established rule of English law that relevant evidence is admissible, even though it has been obtained illegally. Thus, in the Privy Council case of *Kuruma* v. *The Queen*,[12] on the argument that the court should reject and ignore evidence illegally obtained, Lord Goddard in dismissing the appeal had this to say:—

"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle."

Lord Goddard's *dictum* could not be understood by many but it was restored to its rightful position by Lord Diplock in *Reg.* v. *Sang*[13] where in delivering the main judgment of the House of Lords he held at page 437:

"Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commissions of the offence, the judge has no discretion to refuse to admit relevant evidence on the ground that it was obtained by improper or unfair means."

Earlier on, at page 436, His Lordship also made the following statement on the constitution of a fair trial:—

"... the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted."

The principle enunciated in *Kuruma* case was applied again by the House of Lords in *Fox* v. *Chief Constable of Gwent*.[14]

Coming back to this appeal, the evidence of Mr. Tham was not in fact obtained illegally; it was not even obtained by improper or unfair means. The judge had a discretion to admit the evidence of Mr. Tham to determine once and for all the true nature of the opium found in the possession of the appellant. In our view, the fact that the evidence was obtained as a result of the learned judge ordering the exhibits to be sent to the Chemistry Department, instead of being obtained by illegal or unfair means by the police or their agents, cannot possibly make it less admissible merely because it is probative of the appellant's guilt. In our opinion, the evidence of Mr. Tham was undeniably essential for a fair trial and a just decision of the case, and the learned judge had acted judicially in allowing the exhibits to be sent for further examination by the Chemistry Department to determine the species of the plant from which the opium had been extracted. We therefore agree with the learned judge that Exhibits P7 to P15 are "raw opium" and therefore "Dangerous Drugs" within the meaning of section 2 of the Act. Since the appellant was in possession of the raw opium at the material time, the statutory presumptions under sections 37(d) and 37(da) would arise as to knowledge and trafficking. These presumptions had not been rebutted on a balance of probabilities and as such the appellant was rightly convicted.

For the above reasons we dismiss the appeal. We uphold the conviction and affirm the sentence.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*